Supreme Court, U.S.
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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

OFFICER KERRY VINE and
OFFICER MITCHELL PEIXOTO,
Petitioners,

vs.

JAMES FULLER, SR., and JAMES FULLER, JR.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I.

Must a Court consider case law from other circuits in determining whether a right is "clearly established" under a "Qualified Immunity" analysis.

II.

Must a Court grant qualified immunity where out-of-circuit case law holds that the acts do not violate a Constitutional right.

III.

May public officials rely upon out-of-circuit case law, in the absence of in-circuit case law, to determine what Constitutional rights are "clearly established".

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vs.

JAMES FULLER, SR., and JAMES FULLER, JR.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners OFFICER KERRY VINE and OFFICER MITCHELL PEIXOTO respectfully pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 7, 1997, and the Order denying reconsideration and rehearing en banc, entered on August 29, 1997.

OPINIONS BELOW

The Memorandum and Judgment of the United States Court of Appeals for the Ninth Circuit, dated July 7, 1997, appears in Appendix 'A' hereto. The Order Denying Rehearing and Rehearing En Banc, dated August 29, 1997, appears in Appendix 'B' hereto. The Judgment and Order

Granting Partial Summary Judgment of the United States District Court for the Northern District of California, filed on March 25, 1996, appears in Appendix 'C'. This case was previously reported in *Fuller v. Vines*, 36 F.3d 65 (9th Cir. 1994), cert. denied *City of Richmond v. Fuller*, 514 U.S. 1017 (1995).

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was filed on July 7, 1997, and Order denying a petition for rehearing and rehearing en banc was filed on August 29, 1997. This petition for certiorari was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On September 3, 1991, three Richmond, California police officers were approaching on foot a home in which individuals were stripping a stolen car. As they walked past respondents' home, respondents' dog charged one of the officers. Officer Vine shot the dog in self-defense.

Respondents sued the two police officers at the scene, the City of Richmond, and the Chief of Police of the City of

Richmond, alleging state tort law claims and federal civil rights violations.[1] On a motion by Petitioners, the trial court granted summary judgment. On appeal from this order, the Ninth Circuit reversed, holding that the killing of the dog may constitute a "seizure" under the Fourth Amendment. *Fuller v. Vines, supra,* 36 F.3d 65.

On remand, petitioners filed another summary judgment motion, this time on the issues of qualified immunity as to the officers.[2] The motion was based, in part, upon the fact that the only published Federal cases dealing specifically with this issue, both from other jurisdictions, held that shooting a dog at large does *not* constitute a Fourth Amendment seizure. The District Court again granted summary judgment, finding that the officers were entitled to qualified immunity because no "clearly established" right had been violated. Respondents appealed, and the Court of Appeals reversed, holding, despite the contrary authority, that it was well established as of the time of the incident that the shooting of a dog could constitute a Fourth Amendment "seizure".

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[1]Respondents later voluntarily dismissed their claims against the Chief of Police.

[2]The summary judgment motion also addressed Respondents' claims against the City under *Monell vs. Department of Social Services* 436 U.S. 658 (1978). Summary judgment was granted in favor of the City, and Respondents did not appeal this portion of the District Court's order.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT DECISION IMPLICATES AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW

The Supreme Court has explicitly declined to address how lower courts should treat decisions from other jurisdictions when evaluating whether a Constitutional right is "clearly established" for purposes of a qualified immunity defense.

> As in *Procunier v. Navarette,* 434 U.S. at 565, 98 S.Ct., at 861, we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, or the Courts of Appeals, or of the local District Court."

Harlow v. Fitzgerald, 457 U.S. 800, 819, fn. 32 (1982).

Prior to the events alleged in this action, only two published Federal Court cases directly addressed the issue of whether shooting a dog at large could constitute a Fourth Amendment seizure, and both of these cases were Federal Courts outside of the Ninth Circuit. Both of these cases held that shooting a dog did not constitute a Fourth Amendment seizure.

In *Engsberg v. Town of Milford,* 601 F.Supp. 1438, 1443 (W.D. Wis. 1985), the District Court specifically found that the shooting of a dog did *not* amount to a Fourth Amendment seizure.

> The only remaining Fourth Amendment issue is whether any seizure that took place was unreasonable. Engsberg contends, without citing authority, that the destruction of his dog was an unreasonable seizure by Vandre [the officer]; the Court cannot agree with that

> assertion and finds that the only arguable seizure in this case took place when Vandre moved the dogs to bury them on April 27, 1982.

The Court went on to find that the later removal of the dogs did not invade any legitimate expectation of privacy, and consequently did not constitute an unreasonable seizure.

In *Pfeil v. Rogers,* 757 F.2d 850 (7th Cir. 1985), the plaintiff expressly made a Fourth Amendment claim arising from the shooting of his dog by police. *Id.* at p. 852. In determining whether summary judgment was properly granted, the Court of Appeals noted: "We now turn to the question of whether there exists a material issue of fact that Rob's Fourth Amendment rights were violated." *Id.* at p. 863. That section of the opinion concluded: "Although we find the officers' conduct offensive, it does not support an action under Section 1983 because it did not violate a right guaranteed under the United States Constitution." *Id.* at p. 866. There can be absolutely no doubt that the *Pfeil* opinion rejected a Fourth Amendment claim as well as a Fourteenth Amendment claim.

On the original motion for summary judgment, the District Court agreed that no Fourth Amendment seizure took place on the very facts of this case. On consideration of petitioner's second motion for summary judgment, the District Court, considering these above-cited two cases, held that the officers were entitled to qualified immunity because it was not clearly established that shooting a dog implicated the Fourth Amendment. The Ninth Circuit opinion reversing the District Court's order made no reference whatsoever to these published decisions. Petitioners filed a motion for reconsideration focusing upon the fact that these cases were not addressed. The Court of Appeals denied the motion for reconsideration, again without reference to these two cases.

Petitioners believe that the Court of Appeals erred in failing to consider these published decisions in evaluating whether a right was clearly established at the time of the incident. The Court of Appeals also erred in reversing the District Court's order, given the existence of these published decisions. Absent Supreme Court guidance in this area, the Circuit Courts have established diverse and conflicting rules on the treatment of case law from other jurisdictions in their qualified immunity analysis. Given this diversity of opinions, the issue is ripe for determination by this Court.

II.

THERE IS NO CLEARLY ESTABLISHED STANDARD FOR DETERMINING WHAT RIGHTS ARE "CLEARLY ESTABLISHED"

The only published federal case law at the time of the alleged incident held that shooting a dog at large by police officers did not constitute a Fourth Amendment seizure. *Pfeil v. Rogers,* 757 F.2d 850 (7th Cir. 1985), *Engsberg v. Town of Milford,* 601 F.Supp. 1438, 1443 (W.D. Wis. 1985). This Court has held that the test for analyzing a claim of qualified immunity is "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . ." *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985); *Johnson v. Jones,* 515 U.S. 304 (1995).

This Court has used other phrases to describe "legal norms." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991) ["clearly established law" and "settled law"]; *Anderson v. Creighton,* 483 U.S. 635, 639-641, 646 (1987) ["clearly established law," "pre-existing law," "clearly established principles" and "current American law"]; *Wood v. Strickland,* 420 U.S. 308, 322 (1975), ["settled, indisputable law" and "basic, unquestioned constitutional rights"].

This Court has previously declined to state whether lower court case law can establish, or disestablish, a Constitutional right. At the same time, this Court has held that rights were not clearly established where District Courts from other jurisdictions had sanctioned the challenged activities. *Mitchell, supra,* 472 U.S. at 533.

Commentators have observed that the Circuit Courts have, in the absence of guidance from this Court, created varying and inconsistent standards in treating case law from other jurisdictions. See, *e.g.,* Kinports, *Habeus Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law,* 33 Ariz. L.Rev. 115, 140-148 (1991); Comment, *Harlow v. Fitzgerald: the Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983,* 132 U.Pa. L. Rev. 901, 912, 922 (1984). Meyer, *When Reasonable Minds Differ,* 71 N.Y.U.L. Rev. 1467, 1510-1511, 1516-1521 (1996); Blum, *Qualified Immunity: A User's Manual,* 26 Ind.L.Rev. 187, 203-205 (1993); Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law,* 35 Ariz.L.Rev. 621, 626-634 (1993).

The Court indirectly discussed the issue in its recent case, *United States v. Lanier,* ____ U.S. ____, 117 S.Ct. 1219 (1997). In a case involving criminal violation of Constitutional rights, this Court considered the issue of notice for purposes of due process under the Fourteenth Amendment. The Court held that "fair warning" did not require decision on the issue by the Supreme Court. *Lanier, supra,* 117 S.Ct. at 1226.

The Court held that the purpose of the "fair warning" standard is the same as that of the "clearly established"

qualified immunity standard. *Id.*, at 1227. The Court noted that,

> In applying the rule of qualified immunity under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), we have referred to decision of the Courts of Appeals when enquiring whether a right was "clearly established." [Citations omitted]; *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (treating Court of Appeals decisions as "relevant authority" that must be considered as part of qualified immunity enquiry.)

Id., at 1226.

Unfortunately, the *Lanier* decision has not led the Courts of Appeals to take a more expansive view of when they should consider precedents from other jurisdictions.

> The Supreme Court in *Lanier* simply did not address the extent to which decisions of the "lower courts" must, should, or may be considered in deciding whether a constitutional right has been clearly established, nor did it identify any impropriety in considering only the decisions of the circuit or highest court of the state in which the relevant events took place.

Jenkins v. Talladega City Board of Education, 115 F.3d 821, 826, fn.4, (11th Cir. 1997).

Thus, the legal question of what rights are "clearly established" is measured by different yardsticks in each jurisdiction. In the Eleventh Circuit, the Courts look only to the Supreme Court, its own decisions, and State Supreme Court decisions. *Ibid.* On the other hand, the Eighth Circuit has condemned the practice of looking only to cases within the jurisdiction for applicable authority. *Johnson-El v. Schoemehl,* 878 F.2d 1043, 1049 (8th Cir. 1989). In the Sixth Circuit, absent controlling precedents, decisions from other jurisdictions may clearly establish a right only if they

are directly on point and are "clearly foreshadowed by applicable direct authority." *Ohio Civil Serv. Employees Assn. v. Seiter,* 858 F.2d 1171, 1177-78 (6th Cir. 1988). In the Third Circuit, contrary decisions in other circuits may preclude a finding of clearly established law. *Chinchello v. Fenton,* 805 F.2d 126 (3rd Cir. 1986). In the Seventh Circuit, District Court opinions, even within the Circuit, cannot clearly establish a right. *Anderson v. Romero,* 72 F.3d 518, 524 (7th Cir. 1995). On the other hand, rulings from other circuit courts are "instructive on what the law is as to constitutionally protected rights." *Spreen v. Brey,* 961 F.2d 109, 113 (7th Cir. 1992).

In the Ninth Circuit, the published standard (although not applied in the present case) is, in the absence of controlling precedent in the jurisdiction, to:

> look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test.

Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985) (citing Court of Appeals and District Court opinions from other circuits to determine whether the right was clearly established.)

CONCLUSION

If the courts in each circuit are free to ignore decisions of other circuits in their determination of qualified immunity claims, federal rights could be considered "clearly established" in one jurisdiction while at the same time not "clearly established" in another jurisdiction. Having each Circuit establish its own standard on whether to consider decisions outside its jurisdiction only intensifies the disorder present in assessing the purely legal issue of what rights have been "clearly established" under the U.S. Constitution. The resulting fragmentation of rights makes the application of

Constitutional rights subject to geographical nexus, rather than enjoying a nationwide application. The result is to defeat the purpose of qualified immunity; namely, to set a Federal Constitutional threshold to claims of violations of U.S. Constitutional rights, and to protect public officials from liability where their conduct does not violate clearly established rights.

In the final analyses, the purpose of qualified immunity is to allow public officials to guide their actions by looking to settled law which defines the contours of established rights. This purpose is not served by having the courts disagree on the basic issue of how to look for the case law to define a right. Petitioner asks the Court to determine how lower courts should proceed in determining what law has become "clearly established."

DATED: November 7, 1997.

GIBBONS & CONLEY

By: SEAN C. CONLEY
Attorneys for Petitioners

NO. 96-15842
CT/AG#: CV-92-02412-LEW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES FULLER, SR.; JAMES FULLER, JR.
Plaintiffs — Appellants

v.

VINES, *Officer;* PEIXOTO, *Officer;*
ERNEST CLEMENTS; CITY OF RICHMOND
Defendants — Apellees

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of Califonria (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is Reversed and Remanded.

Filed and entered July 7, 1997

A TRUE COPY, CATHY A. CATTERSON, Clerk of Court, ATTEST SEP 8, 1997

By: /s/
Deputy Clerk

No. 96-15842
D.C. No. CV-92-02412-LEW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES FULLER, SR.;
JAMES FULLER, JR.,
Plaintiffs-Appellants,
v.
VINES, OFFICER; PEIXOTO, OFFICER;
ERNEST CLEMENTS; CITY OF RICHMOND,
Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Laughlin E. Waters, District Judge, Presiding

Submitted July 2, 1997**
San Francisco, California

Before: HUG, Chief Judge, SCHROEDER and FERNANDEZ, Circuit Judges.

We are called on to decide whether the Fullers, in asserting that Officers Vine and Peixoto (the "officers") shot and killed their family dog, have alleged the violation of a clearly established right. The district court concluded that they did not and entered summary judgment in favor of the officers on the grounds of qualified immunity. We have jurisdiction, 28 U.S.C. §1291, and we reverse.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

A. Clearly Established Right

The Fullers brought this action under 42 U.S.C. §1983 alleging that the officers seized their family dog, "Champ," in violation of the Fourth Amendment. The district court originally dismissed the complaint for failure to state a claim, and we reversed. *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994) ("*Fuller I*"). Following our remand, the officers moved for summary judgment, arguing that they were entitled to qualified immunity. The district court entered summary judgment in their favor. The Fullers appealed.

The Fullers bear the burden of showing that their right, which allegedly was violated when the officers shot and killed Champ, was clearly established. *See Perkins v. City of West Covina*, 113 F.3d 1004, 1008 (9th Cir. 1997). To be clearly established for qualified immunity purposes, the contours of the asserted right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . " *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, the unlawfulness of the conduct need only have been apparent in light of preexisting law. *Id.*

At least since 1984, it has been clear that "[a] 'seizure' of property occurs . . . when 'there is some meaningful interference with an individual's possessory interests in that property." *Fuller I*, 36 F.3d at 68. The officers concede that a dog is property. They maintain, however, that it was not clearly established that shooting and killing a dog constituted a "seizure" within the meaning of the Fourth Amendment in 1991. They seek to limit the term seizure to "entering someone's private residence, or taking possession of their property."

As we stated in *Fuller I*, "The destruction of property is 'meaningful interference' constituting a seizure under the Fourth Amendment . . . ." *Fuller I*, 36 F.3d at 68 (citing *United States v. Jacobsen*, 466 U.S. 109, 124-25 (1984). Shooting and killing a dog clearly constitutes "destruction" of that dog. In 1991 it was apparent in light of preexisting law that shooting and killing a dog constituted a seizure within the meaning of the Fourth Amendment. The district court thus erred in entering summary judgment for the officers.

B. Attorney's Fee

The Fullers have requested interim attorneys' fees under 42 U.S.C. § 1988. Only a party prevailing "on the merits of at least some of [the party's] claims" can obtain attorneys' fees under § 1988. *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curium). The Fullers are not prevailing parties within the meaning of § 1988 where, as here, they obtained only the reversal of a summary judgment against them. *See Richardson v. Penfold*, 900 F.2d 116, 119 (7th Cir. 1990) (holding plaintiff who obtained reversal of summary judgment was not prevailing party within meaning of § 1988).

The decision of the district court is **REVERSED** and the case is **REMANDED** to the district court for proceedings consistent with this disposition.

A TRUE COPY, CATHY A. CATTERSON, Clerk of Court, ATTEST September 8, 1997

By: /s/
Deputy Clerk

No. 96-15842
D.C. No. CV-92-02412-LEW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES FULLER, SR.;
JAMES FULLER, JR.,
Plaintiffs-Appellants,
v.
VINES, OFFICER, PEIXOTO, OFFICER;
ERNEST CLEMENTS;
CITY OF RICHMOND,
Defendants-Appellees.

ORDER

Before: HUG, Chief Judge, SCHROEDER and FERNANDEZ, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing *en banc.*

The full court has been advised of the suggestion for rehearing *en banc* and no active judge has requested a vote on whether to rehear the matter *en banc.* Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing *en banc* is rejected.

Case No. C-92-02412-LEW

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES FULLER, ET AL.,
Plaintiffs
v.
OFFICER VINES, OFFICER PEIXOTO, CHIEF ERNEST CLEMENTS, IN THEIR INDIVIDUAL CAPACITIES AND AS POLICE OFFICIALS OF THE CITY OF RICHMOND, AND DOES 1-15, INCLUSIVE,
Defendants.

JUDGMENT
ENTERED 3-25-96

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to the memorandum of decision and order filed herewith, the court grants partial summary judgment in favor of defendants on the first and second causes of action in the plaintiffs' first amended complaint. The plaintiffs' remaining causes of action are remanded to state court for further proceedings. The Court orders that such judgment be entered. IT IS SO ORDERED.

DATED: 18 March, 1996

By: /s/
LAUGHLIN E. WATERS
Senior United States District Judge

C-2

Case No. C-92-02412-LEW

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES FULLER, et al.,
Plaintiffs,
v.
OFFICER VINES, OFFICER PEIXOTO, CHIEF ERNEST CLEMENTS, in their individual capacities and as police officials of the CITY OF RICHMOND, and DOES 1-15, inclusive,
Defendants.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND REMANDING THE CASE TO STATE COURT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant's motion for summary judgment came before the Court on February 16, 1996. The Court, having read the pleadings and heard the arguments of counsel, GRANTS summary judgment in favor of defendants as to the first and second cause of action in the plaintiff's First Amended Complaint, and REMANDS the remaining causes of action to state court.

I.

FACTUAL BACKGROUND

Plaintiffs James Fuller ("Fuller") and James Fuller, Jr. ("Lenny"), as well as other members of the Fuller family, filed an amended complaint under section 1983 alleging that defendants, City of Richmond ("City"), former police chief Ernest Clements, and Richmond police officers Vine and Peixoto ("Vine" and "Peixoto") violated their Fourth

Amendment right against unreasonable seizure of their property.

Although the parties present widely divergent accounts of the facts, for purposes of this motion the Court should draw all inferences in favor of plaintiffs, as they are the nonmoving parties. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).

At approximately noon on September 3, 1991, Fuller and Lenny were working on their car in front of their house at 5050 Reid Court in Richmond. The Fuller's 12-year-old pet dog, Champ, a Labrador/Great Dane mix, lay outside in the yard.[1]

At the same time, Officers Vine and Peixoto responded to a call that a stolen car was being stripped in a garage located at 5000 Reid Court. The Officers parked around the corner from the identified location. Vine drew his gun and proceeded toward 5000 Reid Court. Vine kept close to the edge of the houses, with his gun in the ready position. Peixoto followed, slightly behind Vine.

As Vine advanced toward 5000 Reid Court, he passed along the front of the Fuller's home. Champ stood as the officer approached him. Champ neither barked at, growled at, nor moved toward Officer Vine. Fuller saw the officers, approached the spot where Champ and Vine stood and heard Peixoto tell Vine to "shoot the dog." Fuller assured Vine and Peixoto that he could control his dog, and begged them not to shoot. Despite Fuller's pleas and assurances, Vine shot Champ in the shoulder. Peixoto ordered Vine to "finish him off" and Vine again shot Champ, this time in the head.

---

[1] Champ's location in the yard is unclear. Plaintiffs' Complaint places Champ in his "usual spot on the front lawn," approximately 90-100 feet from the Fullers. Plaintiffs' opposition places Champ under his favorite bush a few feet from the driveway where the Fullers worked.

Lenny, shocked and outraged after witnessing the shooting of his per, emerged from the garage holding a vacuum over his head and shouting and the officers. Lenny's friend immediately tackled him, and as Lenny lay on the ground, Vine and Peixoto pointed their guns at him and threatened to send him to the morgue.

The Fullers took Champ to the vet, but he died from his injuries later that day.

By the present motion, defendants Vine, Peixoto and the City of Richmond request that Court grant summary judgment in their favor.

II.

PROCEDURAL BACKGROUND

Plaintiffs filed their original complaint in district court under 42 U.S.C. § 1983, alleging both substantive and procedural due process violations arising out of defendants' shooting of Champ and alleged assault against Lenny. Defendants filed a motion for summary judgment. Plaintiffs filed an opposition to defendants' motion, attaching a motion to amend their complaint to include a Fourth Amendment cause of action. The district court granted defendants' motion for summary judgment and denied plaintiffs' motion to amend, concluding that plaintiffs' proposed amendment would fail to cure the deficiencies in plaintiffs' complaint. Plaintiffs filed a motion for reconsideration, which the district court denied, and plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit upheld the district court's ruling that the proposed amendment would not state a cognizable cause of action for the officers' alleged assault against Lenny. *Fuller v. Vines,* 36 F.3d 65, 68 (9th Cir. 1994). However, the Ninth Circuit reversed the district court's holding that plaintiffs' amended complaint failed to allege a cognizable

claim under the Fourth Amendment for the killing of Champ, finding that "[t]he killing of the dog is a destruction recognized as a seizure under the Fourth Amendment." *Id.*

III.

ANALYSIS

A. Summary judgment standard

In this motion for summary judgment, the burden rests with defendants, as the moving parties, to demonstrate "that there is no genuine issue as to any material fact and that [they are] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The trial court should not "weigh the evidence to determine the truth of the matter"; rather, the court should ascertain whether a genuine issue for trial exists, drawing all justifiable inference in favor of the plaintiffs, as the nonmoving parties. *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986).

B. Plaintiffs' first cause of action: violation of Fourth Amendment rights under 42 U.S.C. §1983

The individual defendants claim that although the Ninth Circuit has now held that their actions constituted a violation of the Fourth Amendment, they are protected by the defense of qualified immunity.

The issue of qualified immunity is a question of law which the court should resolve. *Hunter v. Bryant,* 502 U.S. 224, 228 (1991). In *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985), the Supreme Court described immunity as an "entitlement not to stand trial or face the other burdens of litigation." Qualified immunity constitutes immunity from suit, not merely a defense to liability, and by erroneously allowing a case to go to trial, the Court effectively removes

the entitlement. *Id.* Thus, a court's denial of qualified immunity is immediately appealable. *Id.* at 526-27.

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court announced the modern formulation of the qualified immunity doctrine. Municipal officers are entitled to qualified immunity so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Thus, the inquiry is an objective one, and what Vine and Peixoto subjectively believed is irrelevant.

The definition of what constitutes a "clearly established right" has proved elusive. In *Anderson v. Creighton,* the Court explained that qualified immunity protects an officer from liability for acts which violate the Fourth Amendment, unless a reasonable officer would know that the precise conduct involved was prohibited. *Anderson v. Creighton,* 483 U.S. 635 (1987). Thus, the relevant inquiry here appears to be whether a reasonable officer would have reason to know that, on the date in question, shooting a dog without justification constituted a seizure of property in violation of the property owner's Fourth Amendment rights.

The Fourth Amendment protects people against unreasonable seizures of "the persons, houses, papers, and effects." U.S. Const. amend. IV; *Soldal v. Cook County,* 113 S. Ct. 538, 544 (1992). The Court should subject seizures of property to Fourth Amendment scrutiny even where, as here, no search has taken place. *Id.* at 547.

It is now undisputed in this circuit that "the killing of a dog is a destruction recognized as a seizure under the Fourth Amendment." *Fuller v. Vines,* 36 F.3d 65, 68 (9th Cir. 1994). However, the first case to establish this point conclusively in this circuit was the instant case, on its previous appeal. In deciding whether the killing of a dog was a Fourth Amendment seizure, the Ninth Circuit was forced to cite to

an Eighth Circuit case, since no precedent from this circuit was available. Thus, there was no expressly established Fourth Amendment right under applicable Ninth Circuit law at the time of the incident.

However, defendants may not avoid liability based on the absence of case law directly on point where "[t]he unlawfulness of their conduct should have been apparent to them in light of preexisting case law." *Ostlund v. Bobb,* 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied,* 486 U.S. 1033 (1988). Therefore, this Court must examine the case law in existence at the time of the incident to determine whether or not the officers should have known that their conduct violated the Fourth Amendment. The pre-existing case law, however, is mixed, and at least one circuit had held that the shooting of a dog was not a violation of the owner's Fourth Amendment rights. See *Pfeil v. Rogers,* 757 F.2d 850, 863-66 (7th Cir. 1985). Given this ambiguity, this Court cannot conclude that at the time of the incident, the defendants violated a "clearly established Constitutional right" of which the defendants objectively should have been aware. This conclusion is further supported by the fact that a District Court Judge in this very case believed that the plaintiffs failed to state a Fourth Amendment claim in their amended complaint. Therefore, this Court finds that the individual officers were protected by qualified immunity and thus the motion for summary judgment as to the plaintiffs' first cause of action is GRANTED.

C. Plaintiffs' second cause of action: municipal liability under section 1983

In *Monell v. Department of Social Services,* 436 U.S. 658, 690 (1978), the Supreme Court held that a municipality could constitute a "person" for purposes of section 1983 liability. However, the Court limited this liability, finding that municipalities were only liable for their own unconstitu-

tional or illegal policies. *Id.* at 691. In other words, the Court rejected the notion that a municipality could be sued for the acts of its employees under a theory of respondeat superior. *Id.*

Subsequent cases have provided guidance as to what a plaintiff must show to establish the existence of a municipal policy, holding that a City's failure to adequately train or supervise its officers may constitute an official policy.

1. Inadequate Training

The Supreme Court has held that in order for a plaintiff to demonstrate a policy of inadequate training, the plaintiff must prove "that the failure to train amounts to deliberate indifference of the rights of persons with whom the police come into contact." *City of Canton v. Harris,* 489 U.S. 378, 388 (1989). Thus, a municipality is not liable under section 1983 unless its failure to train represents a "deliberate" or "conscious" choice on its part. *Id.* at 389.

The Court set forth two scenarios which would support the conclusion of deliberate indifference in the failure to train police officers. The second situation, in which a municipality fails to take actions in response to repeated complaints that its officers violate the constitution, is not at issue here. *Id.* at 390 n.10. Rather, plaintiff's claim is more in line with the first situation cited by the Court: that the City of Richmond has failed to provide adequate training in light of the serious, foreseeable consequences which may follow from lack of instruction. *Id.*

The Ninth Circuit has defined deliberate indifference as "conduct that is so wanton or reckless with respect to unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Redman v. County of San Diego,* 942 F.2d 1435 (9th Cir. 1991) (en banc) (finding deliberate indifference where a prison placed a first offender in a cell with a known violent rapist then failed to prove any protec-

tion), *cert. denied,* 502 U.S. 1074 (1992). The court further developed this standard in *Matevko v. Felix*, 924 F.2d 824, 826 (9th Cir. 1990), *cert. denied*, 502 U.S. 814 (1991), a case involving the use of a tazer gun. In *Mateyko*, the court found that the City's failure to provide a more extensive training program constituted, at most "negligence ... in miscalculating the amount of time necessary to prepare its officers." *Mateyko*, 924 F.2d at ;826. The court found no evidence in the record to suggest that the city violated the *City of Canton* standard. Specifically, the court saw no indication that "the City knew it was creating an unjustifiable risk to its citizenry" yet chose to "ignore[ ] that risk as required by *City of Canton.*" *Id.*

Likewise, here, plaintiffs have failed to provide any evidence that the City of Richmond was conscious that its lack of training created an unjustifiable risk, let alone that it chose to ignore that risk. *Mateyko*, 924 F.2d at 826. The City's failure to provide its officers with more extensive training is not so obviously likely to result in the type of situation which, in fact, transpired, as to meeet the very high standard of *City of Canton.*

Because plaintiffs have failed to provide this Court with any evidence that the City's failure to provide more training in dealing with encounters between police officers in dogs constituted deliberate indifference on the part of the City, the Court concludes that the *Monell* claim cannot be based on an allegation of inadequate training.

2. Inadequate Supervision

The Ninth Circuit has found no "principled reason" not to apply the same deliberate indifference standard to claims involving inadequate supervision. *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989). Accordingly, the analysis above also applies to plaintiffs' claims that the City of Richmond inadequately supervised its officers. For

the same reasons announced above, plaintiffs have failed to establish evidence that the City knew that its failure to supervise its officers created an unjustifiable risk that this type of incident would occur, and ignored that risk. Accordingly, the Court concludes that the *Monell* claim cannot be based on an allegation of inadequate training.

Therefore, the plaintiffs cannot support their *Monell*claim, and so this Court GRANTS summary judgment in favor of the City on plaintiffs' second cause of action.

D. Plaintiffs' remaining causes of action

The plaintiffs' remaining causes of action are all state claims, and since this Court is granting summary judgment against the plaintiffs on the federal claims, the Court no long has any jurisdiction over the pendent state claims. Therefore, these remainaing causes of action are REMANDED to state court for further proceedings.

IT IS SO ORDERED.

DATED: 18 March, 1996

/s/

LAUGHLIN E. WATERS
Senior United States
District Judge